STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. **2004G080(C)**

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

SEAN McGUIRE,

Complainant,

vs.

DEPARTMENT OF REVENUE,

Respondent.

Administrative Law Judge Denise DeForest held the hearing in this matter on June 10 and 11, 2008 at the State Personnel Board, 633 - 17th Street, Courtroom 6, Denver, Colorado. The record was closed on June 11, 2008 by written order. Assistant Attorney General Christopher J. Puckett represented Respondent. Respondent's advisory witness was Ron Kammerzell, the Director of the Division of Gaming for the Department of Revenue and the current appointing authority for that division. Complainant appeared and was represented by Rick Dindinger, Esq.

MATTER APPEALED

Complainant, Sean McGuire ("Complainant") appeals the selection procedure used by the Division of Gaming in the selection of a Criminal Investigator II position. Complainant seeks to be appointed to the position of Criminal Investigator II, an award of back pay, benefits, and interest, and reimbursement of attorney fees and costs.

For the reasons set forth below, Respondent's action is **rescinded.**

ISSUES

1. Whether Respondent's action was arbitrary, capricious or contrary to rule or law;

2. Whether attorney fees are warranted.

FINDINGS OF FACT

General Background:

1. Complainant was originally hired within Respondent's Taxation Division, Field Inspections, in June of 2000 in an intern revenue agent position. Revenue agents in this division examine the books of companies to determine whether appropriate tax has been paid to the state. Agents receive progressively more complex assignments as they move from the classroom learning and on-the-job training at an intern level to Revenue Agent I, Revenue Agent II, and Revenue Agent III. The division permits faster promotions for agents with advanced degrees related to the field of financial auditing.

2. Complainant has an undergraduate degree in business administration from the University of Colorado. Complainant has also obtained a law degree from the University of Denver in 1991 and an L.L.M. in taxation from the same school in June of 2000. Complainant has been certified as a Certified Public Accountant ("CPA") since March 1981, and first received a law license in April 1991. He has maintained his CPA designation during his employment with Respondent. Complainant has not actively practiced law while employed by Respondent.

3. By August of 2003, Complainant was 51 years old.

Complainant's Grievances Filed In The Fall of 2003:

4. Complainant spent 15 months as an intern, and then promoted to a Revenue Agent I position in October 2001.

5. Prior to the summer of 2003, Complainant filed a grievance with his supervisors alleging discrimination in the manner in which the department planned to consider his potential promotion to Revenue Agent II. That grievance was resolved with a plan that listed criteria that, upon completion, would result in Complainant being promoted to Revenue Agent II.

6. Complainant believed that he had completed the requirements necessary for promotion to Revenue Agent II by July of 2003, but discovered that his promotion had been delayed by his direct supervisor, Linda Quade, until September 8, 2003. When he learned that his promotion was not scheduled to go into effect until September of 2003, Complainant filed a grievance. The Senior Director of the Taxation unit, John Vecchiarelli, handled the step 2 level for that grievance.

7. In the fall of 2003, a new performance review plan for audits was about to be implemented. Complainant had a question for his supervisor, Ms. Quade, about which set of evaluation standards would be applied to a particular audit he had conducted. During

his conversation with Ms. Quade on October 1, 2003, Ms. Quade laughed and told him that it didn't matter which set of standards would be applied because she "could f**k him either way."

8. Complainant filed another grievance concerning the inappropriateness of Ms. Quade's response to his inquiry. That grievance was consolidated with his grievance concerning the delay in his promotion. Prior to the resolution of Complainant's grievance, Ms. Quade apologized in writing for losing her temper and making an unprofessional and vulgar comment to him.

9. Complainant included other issues in his grievances, including his contention that he had been unfairly disqualified for the application process for Tax Investigative Auditor and that he believed that Ms. Quade was interfering with his chance at changing positions. Complainant also included a claim that he had been discriminated against in the workplace on the basis of disability, sex, age, and political affiliation.

10. Mr. Vecchiarelli convened a panel to investigate the grievance issues to make a recommendation as to the outcome of step 2 of the grievance process. That panel consisted of three managers within Respondent's Tax Audit Division: Ken Mergl, Patti Smith, and Chuck Dieter.

11. The panel met with Complainant on or about January 12, 2004.

12. At the start of that meeting with Complainant, Mr. Dieter spoke to Complainant and told him that, if he kept this up, he was not going to go anywhere. At time this statement was made, the tape recorder which was to be used to record the meeting had been turned off by Mr. Dieter.

13. The panel issued its recommendation report by letter dated January 26, 2004. The panel recommended that, while it found no evidence of discrimination against Complainant, that his promotion to Revenue Agent II had been unfairly delayed by five weeks and that he should receive a temporary pay differential for those five weeks and have his records reflect that his promotion was effective five weeks earlier than it had occurred. The panel also found that Ms. Quade's apology for her language was a sufficient remedy for her outburst on October 1, 2003. The panel declined to find that any type of discrimination against Complainant on the basis of disability, sex, age, and political affiliation had occurred.

14. Mr. Vecchiarelli concurred with the panel's report and informed Complainant that he had accepted the panel's recommendations. Complainant was notified of this result by letter dated January 29, 2004.

15. Complainant filed a timely appeal with the Board on February 19, 2004 concerning Mr. Vecchairelli's decision to move his promotion date only to August 1, 2003. Complainant also included his claims of discrimination and retaliation on the basis of

gender, age, and disability in his appeal to the Board.

The Job Posting for Criminal Investigator II Position #272:

16. On November 10, 2003, Respondent announced the opening of position #272, Criminal Investigator II in the Division of Gaming. The job posting was open until November 24, 2003.

17. The Criminal Investigator II position required a bachelor's degree or higher in accounting, finance, or a closely related field and two years of professional experience in financial auditing and/or fraud investigations. The announcement also listed as a necessary special requirement that applicants had to be currently certified or re-certifiable by the state Peace Officer Standards and Training ("POST") board, must be willing and able to travel nationally and internationally on a frequent basis, and must successfully pass a background investigation prior to appointment with the Gaming Division.

18. Complainant met the minimum qualifications described in the position announcement. Complainant was not POST-certified at the time of his application but he had been POST-certified during his prior service as a state trooper and could be re-certified.

19. The announcement for position #272 included information on applicant appeal rights should the Human Resources review of the application result in a determination that the applicant did not meet the minimum qualifications. The appeal rights informed applicants that a rejected applicant would be able to discuss the rejection with someone in the Human Resources office within five days of receiving a rejection letter. Applicants were also advised that, if they still did not agree with the Human Resources review of their application, they could have their "application rejection reviewed by the State Personnel Director."

20. Complainant filed a timely application for the position. His application passed the Human Resources review for minimum qualifications, and he was permitted to test for the position.

21. The first part of the test for position #272 was a written exercise. The test took place on December 22, 2003. Approximately fifteen candidates took the test.

22. The top eight candidates, as scored on the written exercise, were then invited to an oral interview with a panel of three Division of Gaming managers.

23. The oral interview was held on January 5, 2004. The first stage of the oral interview required applicants to examine the financial statements for a company. Candidates were asked to then discuss and critique the financial problems of the company.

The January 2004 Eligible List for Criminal Investigator II:

24. Respondent received notification by letter dated January 6, 2004, that he was being considered for employment with the Division of Gaming as a Criminal Investigator II. The letter notified Complainant that his name had been sent to a manager in the Division of Gaming, Laura Manning, and informed him that, if he was still interested in the position, he had to contact Ms. Manning by January 12, 2004, to be considered for the position. The letter also notified Complainant that the letter was not a job offer, but only a referral to an interview.

25. Complainant immediately contacted Ms. Manning by leaving her a voice mail indicating his interest in the position. Ms. Manning did not return the call.

26. On or about January 23, 2004, Complainant spoke with Arlene McClellen of Respondent's Human Resources section. Ms. McClellen told Complainant that he had been the only one who had passed the tests for position #272, and that Ms. Manning had to make a decision about how she wanted to handle a referral list with only one name on it.

27. Complainant had not heard back from Ms. Manning by phone, so he e-mailed her to express his interest in being interviewed for the Criminal Investigator II position.

28. On January 26, 2004, Ms. Manning responded to Complainant's e-mail requesting an interview by telling Complainant: "Thank you for your concern regarding this matter. We are proceeding in a manner we feel is appropriate and if the position should be reposted, you are more than welcome to apply."

29. In or around February 2004, Complainant consulted with the attorney and staff for the Colorado Federation of Public Employees about the selection process for Criminal Investigator II.

The Decision To Cancel The January 2004 Eligible List:

30. In late 2003, Laura Manning held the position of Chief of Investigations for Respondent's Division of Gaming.

31. The appointing authority for the Division of Gaming, Mark Wilson, assigned Ms. Manning to conduct the selection of a candidate for the Criminal Investigator II position within the division.

32. Respondent's Human Resources section considered a referral list of fewer than three individuals to be an incomplete referral list. Based upon a long-standing practice approved by the Division of Human Resources, Department of Personnel and Administration ("DPA"), Respondent's Human resources section believed that an incomplete referral list could be cancelled without waiting for the expiration of the eligible

list for the subject position, and the selection process would begin again.

33. Ms. Manning was told by Ms. McClellan that she had a choice to make because the referral list was incomplete. Ms. Manning was told that she could go forward with the incomplete list or she could cancel the list, re-open the position and go through the process to create another eligible list of Criminal Investigator II candidates.

34. Ms. Manning did not know Complainant or have any conversations concerning Complainant with his supervisors in the Taxation division. She made the decision to cancel the January 2003 eligible list based upon a desire to obtain a complete referral list of at least three candidates for the position.

35. Mary Sierra conducted the selection and recruitment process for Respondent's human resources section. Ms. Manning and Ms. Sierra talked about how the testing process for the Criminal Investigator II position could be modified to provide a larger eligible list. They decided that the restriction which created a need to have a current POST certification could be changed so that applicants could be qualified to test if they agreed to become POST certified after the division hired them.

36. A change was also made to the testing process for the position so that the entirety of the test was an oral test. All of the candidates who had demonstrated that they possessed the minimum qualifications for the position were permitted to test. The revised testing procedure placed more of an emphasis on oral skills than the original testing process, which had included both oral and written exercises.

37. Ms. Manning considered it to be the duty of the Human Resources section to tell Complainant that the eligible list was to be cancelled and that the position was going to be re-posted. Ms. Manning did not inform Complainant that the January 2004 eligible list had been cancelled.

38. Ms. Sierra considered it to be the duty of the supervisor to inform a candidate that the eligible list was to be cancelled and that the candidate would not be interviewed as part of the original solicitation process.

The Re-Posting of Position #272:

39. Complainant was notified by Ms. Sierra in writing that position #272 was to be re-posted. The letter that Ms. Sienna sent to Complainant was not one of the standard letters used to inform applicants that their names had been removed from the eligible list. Ms. Sierra did not have a standard letter which provided notification of the cancellation of an eligible list.

40. The letter which Ms. Sierra sent to Complainant dated February 17, 2004, read, in relevant part:

Dear Applicant:

Your name is the only name remaining on an eligible list for a Criminal Investigator II position in this Department of Revenue's Gaming Division.

With only one name eligible for referral, the current list is considered incomplete. State of Colorado Personnel Rules provide that the appointing authority may reannounce a position in order to establish a complete eligible list where at least three qualified applicants are available for interview. Applicants on the "incomplete" list must be invited to reapply if still interested.

We hope that you are still interested in this position. Please mail or fax (303-866-3718) your completed application to the Department of Revenue, 1375 Sherman Street, Room 132, Denver, CO 80261. For your convenience a copy of the announcement and an application are included. If your application is not received by the closing date on the announcement you will be considered withdrawn.

Sincerely Yours,

Mary E. Sierra
HR Specialist

41. Ms. Sierra's letter of February 17, 2004, and the e-mail to which she attached the letter, did not inform Complainant that the January 2004 eligible list was cancelled or provide Complainant with notification of his appeal rights concerning the decision to cancel the eligible list.

42. At no time did Ms. McClellan or Ms. Sierra tell Complainant that the eligible list was cancelled or provide him with notice as to his appeal rights for that decision.

43. Complainant understood from the communications he had received as of the middle of February 2004 that the division was going to add candidates to the referral list. He believed that he was still on the eligible list created in January 2004, and was willing to submit whatever paperwork he needed to submit in order to be considered for the position. Complainant submitted his application for the position again.

44. Position #272 was posted again on February 18, 2004, with the revised necessary special requirements statement. The announcement closed on February 20, 2004.

45. Respondent received more than 31 applicants in that three-day period. Of those applicants, approximately 18 candidates were found to have met the minimum requirements and were invited to test for the position.

46. Testing for the position was scheduled for March 11 and 12, 2004. Complainant was instructed by letter dated February 27, 2004, to report for testing on March 12, 2004.

The Second Testing Process for Position #272:

47. The Criminal Investigator II examination of March 12, 2004, was graded by Maren Rubino, Phil Dinan, and Brenda Davis. (Stipulated Fact) These individuals were supervisors within the Division of Gaming and were not the supervisors who had graded the December 2003 examination.

48. At the time they graded the examination, none of the graders were less than 48 years old. (Stipulated Fact)

49. Complainant did not receive a passing score on the second examination. He was notified by letter dated March 15, 2004, that his score was not high enough to pass.

50. Complainant understood from the letter of March 15, 2004, that he was not going to be considered for the position of Criminal Investigator II.

51. On March 22, 2004, Complaint filed an appeal with the Board concerning the selection process for position #272, including the failure of the agency to interview him once he had been referred for the position in January 2004.

Other Candidates for Position #272:

52. Walt Koski applied for the Criminal Investigator II position # 272 both in November of 2003 and March of 2004.

53. Mr. Koski did not pass the testing phase of the November 2003 job posting. Laura Manning or Rob Kammerzell told him to monitor the website because the position may be reposted. When he saw the reposting of position #272, he applied again, passed the revised testing process for the position, and was placed on the referral list for the position. Mr. Koski was interviewed and hired as a Criminal Investigator II. His start date was May 1, 2004. At the time of his hiring, Mr. Koski was 32 years of age.

54. Joanna Meyer applied for position #272 in the second round of postings for position #272. She passed the examination, was referred for consideration for a position of Criminal Investigator II, and was hired by Respondent.

55. At the time she took the examination in March of 2004, Ms. Meyer was 30 years old.

Complainant's Appeals to the Board:

56. Complainant's appeal of Mr. Vecchiarelli's response to his grievances concerning

the delay in his promotion to Revenue Agent II level and his claim of discrimination and retaliation by DOR supervisors were given Board case number 2004G080.

57. On March 22, 2004, Complainant filed his second appeal with the Board. This second appeal challenged the selection process for DOR Criminal Investigator II position #272. Complainant's appeal of March 22, 2004, included his allegations of discrimination. Complainant also specified that he was challenging the validity of the panel assessment device administered on March 12, 2004, as well as the results from that testing process.

58. By Order dated March 24, 2004, the administrative law judge handling the appeals ordered the parties to show cause why Complainant's two appeals should not be consolidated.

59. On April 5, 2004, Respondent filed a response to the Order To Show Cause in which the agency stated "Respondent does not object to the consolidation of Complainant's appeals into Case No. 2004G080(c)." The two appeals were subsequently consolidated by the Board.

60. On April 12, 2004, Complainant filed a retaliation complaint under the State Employee Protection Act, C.R.S. § 24-50.5-103 ("Whistleblower complaint"). By order dated April 14, 2004, the ALJ required the parties to show cause why the Whistleblower complaint should not also be consolidated into 2004G080(C). Complainant's Whistleblower complaint was consolidated with the other appeals by order dated May 5, 2004. The Whistleblower complaint was dismissed from the case after a ruling on a Motion To Dismiss filed by Respondent.

61. By appeal filed June 27, 2005, Complainant appealed the finding of the Colorado Civil Rights Division of no probable cause related to his claim of discrimination.

62. Once the appeal of the CCRD finding was filed, the Board issued a Notice of Preliminary Review. The Preliminary Recommendation recommended that a hearing be denied. The Board adopted that recommendation at its June 20, 2006 meeting.

63. Complainant appealed the Board's decision to deny him a hearing to the Colorado Court of Appeals. On September 20, 2007, the Court of Appeals issued a decision remanding the matter to the Board for hearing on two issues: whether Complainant was discriminated against on the basis of age or disability when he was not hired for the Criminal Investigator II position, and whether the cancellation of the January 2004 eligible list was arbitrary, capricious or contrary to rule or law.

DISCUSSION

I. GENERAL

The Board may reverse Respondent's decision if the action is found to be arbitrary,

capricious or contrary to rule or law. C.R.S. § 24-50-103(6), C.R.S. Complainant bears the burden of proof for both his challenge to the selection process for position #272 and on his claim of discrimination. *See Colorado Civil Rights Commission v. Big O Tires, Inc.*, 940 P.2d 397, 400 (Colo. 1997); *Kinchen v. Dept. of Institutions*, 886 P.2d 700, 705 (Colo. 1994).

II. JURISDICTIONAL ISSUES

Respondent raised jurisdictional challenges to the Board's consideration of one of Complainant's claims. These challenges were included in a Motion To Dismiss, filed shortly before the hearing, as part of its trial brief, and as part of a Rule 41(b)(2) Motion to Dismiss at the conclusion of Complainant's case-in-chief.

The focus of Respondent's argument is the inclusion in the Board hearing of Complainant's claim that the cancellation of the January 2004 eligible list violates the state constitution and statutes. In the unpublished Court of Appeals decision in *McGuire v. Colorado Department of Revenue* (Colo.App. September 20, 2007), which remanded this matter to the Board for hearing, this argument is referred to as the "constitutional claim." That nomenclature continued to be used by the parties at hearing.

A. Allegations of the Untimely Filing of the Constitutional Claim:

Respondent filed a Motion to Dismiss Complainant's Constitutional Claim As Untimely on May 29, 2008, arguing that Complainant's March 22, 2004 appeal which addressed the issue was an untimely filing. The ruling on this issue was reserved until after the factual findings had been made.

The Board's organic statutes provide that there is a ten-day window for an aggrieved employee to request a hearing before the Board:

> Except for discrimination appeals that may also be filed with the Colorado civil rights division in the department of regulatory agencies, all appeals from actions of the state personnel director, appointing authorities, and agencies that are specifically appealable to the board under the state constitution or this article shall be filed with the board within ten days of receipt of notice of such action.

C.R.S. § 24-50-125.4(1).

Respondent contends that Complainant had constructive and actual notice that he had ten days to file his appeal, and that he filed with the Board only after more than 20 days had passed. Respondent argues that the ten-day period for filing with the Board is jurisdictional and that, therefore, Complainant's appeal should be dismissed as untimely. *See Cunningham v. Dept. of Highways*, 823 P.2d 1377, 1380 (Colo.App. 1991)(holding that "if an appeal or a request for an extension of time is not filed within the statutory ten-

day period [in C.R.S. § 24-50125.3], it is generally true that the agency lacks jurisdiction to review the action complained of"). *See also State Personnel Board v. Gigax*, 659 P.2d 693, (Colo. 1983)(holding that, under a similar ten-day deadline for disciplinary appeals under C.R.S. § 24-50-125(3), "an employee dissatisfied with the decision of the Board must file either a petition for review or a request for an extension of time within the ten-day limit or the decision becomes final").

The statutory deadline runs ten days from "receipt of the notice of such action." The important factual question, therefore, is to determine if and when Complainant received notice of the action that he is appealing. In this case, the action at the heart of this matter is Respondent's decision to cancel the January 2004 eligible list for the Criminal Investigator II position.

The record in this case is clear that Complainant had no actual notice given to him about the cancellation of the eligible list for the Criminal Investigator II position. Respondent's human resources section considered it to be the job of the managers involved in the hiring process to inform Complainant of his status (or lack of status, as was the case). The manager in charge of the hiring process did not consider it to be her job to provide Complainant with any information about his status as an applicant. The written documents that Complainant received in the course of this hiring process never mentioned the cancellation of the eligible list.

There are standard forms which are used to notify candidates of their removal from eligible lists for reasons other than the cancellation of the list. At the time of this matter, however, there was no form letter available to the Human Resources section to be sent out in the event of the cancellation of an entire eligible list. The closest communication to a notification was the February 17, 2004 letter from Ms. Sierra to Complainant. The February 17 letter to Complainant referred to a re-announcement of the position "in order to establish a complete eligible list where at least three qualified applicants are available for interview." This letter makes it appear as if the referral list is going to be supplemented, and that the only question at that point was whether Complainant was still interested in the position or should be considered to have withdrawn from the process.[1]

As a result, there was no actual notice provided to Complainant that the referral list generated by the December 2003 testing process was going to be ignored in its entirety and that an entirely different list was going to be generated.

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[1] Respondent presented testimony that Complainant would have been given a formal notice of appeal rights at the time he tested for the second posting of position #272, which was on March 12, 2004. That notice, however, would have been similar, or identical, to the notice provided to Complainant during the first testing process. *See* Finding of Fact ¶19. Complainant was not attempting to appeal the human resources review of his qualifications, however, and so the appeal rights provided would not suffice for purposes of determining the ten-day period for Complainant's appeal of the cancellation of the January 2004 eligible list. Even if this written notice was construed to be proper notice for Complainant's issue, however, Complainant's appeal would then be timely because he filed with the Board ten days after he received the appeal rights notification.

Respondent argues, however, that Complainant should be held to have had constructive knowledge of the cancellation of the eligible list. Constructive knowledge refers to "knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." *Lombard v. Colorado Outdoor Education Center, Inc.*, -- P.3d -- (Colo. June 30, 2008)(quoting from *Black's Law Dictionary*). *See also Morgan v. Board of Water Works*, 837 P.2d 300, 303 (Colo.App. 1992)(holding that even where employees did not have actual knowledge of a danger on the premises, they were deemed to have constructive notice if they should have known of the danger through the exercise of ordinary diligence).

Respondent argues that Complainant is an attorney who consulted other lawyers during the time this action was pending, and that he should be held to have had notice that Respondent was canceling the eligibility list as soon as he was told that he needed to reapply for the position or, alternatively, when he was told he needed to retest for the position.

One overriding problem with Respondent's argument is that Respondent never properly explained what it was doing with the January 2004 eligible list. The explanations given were consistent with, or perhaps even more consistent with, supplementing the January 2004 eligible list rather than discarding the list entirely. Additionally, there is no rule or statutory support for the concept of a "cancellation" of an eligible list. By statute, eligible lists remain in effect for at least six months, with no provision for an early termination of any type. Under such circumstances, Complainant cannot be said to have constructive notice of the cancellation of the January 2004 eligible list for the position of Criminal investigator II.

It was Respondent's obligation to start the appeal clock by providing proper notice as to what it was doing with the result of the January 2004 eligible list. Complainant had neither actual nor constructive notice from Respondent that the referral list from the December 2003 testing process was being discarded in its entirety. Accordingly, without any notice from Respondent from which the ten-day period can run, Respondent cannot now complain that the appeal was late. *See Salas v. State Personnel Board, 775 P.2d 57, 60* (Colo.App. 1988)(holding that, when a notice of termination failed to notify the employee of his right to appeal the action to the Board, an appeal filed 48 days after termination is not time-barred). *See also Cunningham*, 823 P.2d at 1380 (holding that the general rule that an appeal must be filed within the statutory ten day period does not apply "if the notice of the right to appeal, required to be given to the person adversely affected by that action, is not provided to that person").

B. Respondent Has Waived Any Objection to The Board's Jurisdiction Over Complainant's Constitutional Claim:

Respondent argued as part of its Rule 41(b) Motion To Dismiss, and in its trial brief, that the Board does not have jurisdiction over Complainant's constitutional claim because the claim concerns a selection process and C.R.S. § 24-50-112.5(4)(a) provides that

selection appeals are to be filed with the State Personnel Director. *See also Cunningham*, 823 P.2d at 1380(applying an earlier version of the statute and concluding that all complaints about selection and examination process not involving allegations of discrimination are to be filed with the State Personnel Director, and that claims of discrimination are to be filed with the Board or the civil rights division).

Respondent was notified of the intent to consolidate all of the appeals, including the constitutional claim, and agreed to the consolidation. The time to object that an particular appeal should be before the Director occurred when the Board issued its Order To Show Cause as to why all of the Complainant's appeals, including the constitutional claim, should not be consolidated. Respondent agreed in writing to the consolidation after having being informed of the nature of the claims to be consolidated, and Respondent argued that case at the preliminary recommendation stage of the Board's hearing process and included in its discussion the constitutional claims made by Complainant. For purpose of defending its position before the Board, therefore, Respondent has waived its objection with the filing of its agreement that Complainant's March 22, 2004 appeal (which included the constitutional claim) should be consolidated with his earlier appeal. *See Dept. Of Health v. Donahue*, 690 P.2d 243, 247 (Colo. 1984)("Waiver is the intentional relinquishment of a known right or privilege... A waiver may be explicit, as when a party orally or in writing abandons an existing right or privilege; or it may be implied, as, for example, when a party engages in conduct which manifests an intent to relinquish the right or privilege or acts inconsistently with its assertion").

Additionally, Respondent's argument ignores the fact that the Board has jurisdiction to hear appeals by employees of actions "of the appointing authority." Colo. Const. Art XII, Section 14(3)(authorizing the Board to enact rules to hear "appeals from actions by appointing authorities"). *See also Rentaria v. Colorado State Dept. of Personnel*, 811 P.2d 797, 801 (Colo. 1991)(finding that the Board does not have implied constitutional power to review an allocation decision made by the Personnel Director because the Board's appellate authority under the state constitution is to review the actions of appointing authorities).

Respondent's Motion to Dismiss based upon its argument that the Board is without jurisdiction to hear Complainant's constitutional claim is **DENIED.**

III. HEARING ISSUES

A. The Appointing Authority's action was arbitrary, capricious, or contrary to rule or law.

1. The merit-based state selection system depends upon a system of employment lists which operate for a period of six months or longer.

In order to understand the referral process, it is helpful to first review the basic terms and principles of the state personnel system selection.

"The plain purpose of the civil service law and the intent of the legislature and the people in enacting it was to substitute the merit system for the old doctrine of 'to the victor belongs the spoils' in the civil service of the state." *People ex rel. Walker v. Capp*, 158 P. 143, 145 (Colo. 1916).

Section 24-50-101(4), C.R.S., provides that employee advancement is to be based upon "demonstrated ability" and "quality of performance." Both the state constitution and the state statutes require that appointments and promotions are to be made without regard to race, creed, or color or political affiliation. Colo. Const. Art. XII, Section 13(1); C.R.S. §24-50-112.5(1)(b). State statute also provides that selection is to made without regard to religion, national origin, ancestry, and age and without regard to sex or disability except as otherwise provided by law. *Id.*

An appointing authority can permanently fill a position through several mechanisms, including the use of transfers, voluntary demotions, and departmental re-employments lists. *See* Board Rule 4-6, 4 CCR 801. Assuming, however, that the decision has been made to fill the position with a candidate who is not currently, and who has not been, in the classification of the open position, then an appointing authority is likely to be conducting a selection process to create an employment list.

The first step of any selection process is to determine who are "qualified applicants." "Only qualified applicants shall be included in the examination process." C.R.S. § 25-50-112.5(3)(a). As a practical matter, this step of the process usually involves evaluating the application submitted by an applicant to determine if that applicant at least meets the minimum qualifications for the position.

Once the applicants who do not possess the minimum qualifications are eliminated from the pool, an examination process begins. "Appointment and promotions to positions shall be based on job-related knowledge, skills, abilities, competencies, behaviors, and quality of performance as demonstrated by fair and open competitive examinations." C.R.S. § 24-50-112.5(1)(b). Examinations "shall be based on specific job-related knowledge, skills, ability, behaviors, and other competencies," and they are to be "conducted as needed." C.R.S. § 24-50-112.5(3)(a).

Once the examination process is completed, the overall scores of candidates are calculated and a list of candidates who have passed the examination is prepared. At this point, any applicable veteran preference points are added to the scores of passing candidates, *see* C.R.S. § 24-50-112.5(2)(b), and the list is ranked according to final scores. Under the nomenclature of the Board rules and the state statutes, this ranking creates an "eligible list," and an eligible list is a form of "employment list." [2]

[2] An eligible list is the result of a testing process, such as occurs as the result of an open competitive job announcement or a promotional test. Employment lists include eligible lists as well as lists of qualified applicants resulting from non-testing processes, such as transfer lists and departmental reemployment lists.

In a merit-based system for selection, eligible lists are a foundational requirement because the lists limit the manner in which applicants are referred for consideration for any openings in the classification. An appointing authority is only able to consider, at most, the highest ranking three candidates for a position. "The person to be appointed to any position shall be one of the three persons raking highest on the eligible list or such lesser number as qualify." C.R.S. § 24-50112.5(2)(b). There is no requirement that the list contain at least the names of three candidates.

By statute, an eligible list exists for six months, or longer if the list is extended. "The duration of an eligible list shall be six months but may be extended by the state personnel director." *Id.* The practical effect of this statutory requirement is that, once an eligible list is created for a particular classification, then that list will be used to generate the referral lists of appropriate size for each round of hirings in that classification while that eligible list is in existence.

2. Respondent's practice of cancelling "incomplete" eligible lists is contrary to state law:

Complainant argues that Respondent's decision to cancel the January 2004 eligible list for the Criminal Investigator II position was contrary to the state constitution, state statute, and a Director's Procedure.

Complainant begins his argument with Colo. Const. Art XII, which includes this provision:

> The person to be appointed to any position under the personnel system shall be one of the three persons raking highest on the eligible list for such position, **or such lesser number as qualify**, as determined from competitive tests of competence, subject to limitations set forth in rules of the state personnel board applicable to multiple appointments from any such list.

Colo. Const. Art. XII, Section 13(5)(emphasis added). Complainant argues that this language is to be applied according to its unambiguously plain meaning, which is to say that that appointments must be taken from eligible lists, and that eligible lists may well have less than three individuals on them.

Complainant then turns to state statutes defining eligible lists. C.R.S. § 24-50-112.5 again reinforces the language of the constitution that an eligible list can contain less than three names. *See* subsection (2)(b)("The person to be appointed to any position under the state personnel system shall be one of the three persons ranking highest on the eligible list or such lesser number as qualify").

Complainant argues that the concept of cancellation of a list is directly contrary to the next provision of C.R.S. § 24-5-112.5(2)(b): "The duration of an eligible list **shall be six months** but may be extended by the state personnel director" (emphasis added).

Finally, Complainant notes that Director's Procedure P-4-18 mandated that "all those who respond to a referral should be interviewed in compliance with state and federal law."

As a result, Complainant argues that he was at least entitled to interview for the position of Criminal investigator II as the only person on the January 2004 eligible list, and that the January 2004 eligible list could not be discarded any earlier than six months from the date of its creation.

Respondent has presented no persuasive reason to believe that the cancellation of an eligibility list is allowable under the terms of the relevant terms of the state constitution and state statutes. Respondent's primary defense is that the cancellation procedure is a long-standing practice approved by the Division of Human Resources in the Department of Personnel and Administration in order to make certain that appointing authorities have at least three candidates from which to select.

Complainant's arguments are persuasive. C.R.S. § 24-50-112.5(2)(b) unambiguously provides that eligible lists "shall be" in effect for six months or longer. "'Shall' is a word of command, denoting obligation and excluding the idea of discretion." *Hodges v. People*, 158 P.3d 922, 926 (Colo. 2007). The cancellation of eligibility lists prior to the expiration of six months on the basis that fewer than three names are presented on that list directly violates that statutory mandate and the constitutional acknowledgement that fewer than three individuals can be on an eligibility list. In other words, there is no cancellation option available to appointing authorities on the grounds that the eligibility list is "incomplete." The fact that cancellation of eligible lists is a long-standing practice does not change this result. Even if this practice had been authorized by a properly promulgated agency rule, it would still be invalidated by the requirements of C.R.S. § 24-50-112.5(2)(b). *See Ettelman v. Colorado State Board of Accountancy*, 849 P.2d 795, 798 (Colo.App. 1992)("A regulation may not modify or contravene an existing statute, and any regulation that is inconsistent with or contrary to a statute is void") .

Respondent's actions in cancelling the January 2004 eligibility list and failing to interview Complainant for the position of Criminal Investigator II once he had been referred for that position were, therefore, contrary to state law.

B. Complainant's Age Discrimination Claim:

The Colorado Anti-Discrimination Act ("CADA"), C.R.S. § 24-34-401 *et seq.*, makes it a discriminatory or unfair employment practice for an employer to "refuse to hire, to discharge, to promote or demote, to harass during the course of employment or to discriminate in matters of compensation against any person otherwise qualified because of

disability, race, creed, color., sex, religion, age, national origin, or ancestry..." C.R.S. § 24-34-402(1)(a).

The elements of a CADA *prima facie* case of age discrimination are: 1) that the complainant belongs to a protected class; 2) that the complainant was qualified for the job at issue; 3) that, despite his other qualifications, the complainant suffered an adverse employment decision *e.g.,* a demotion or discharge or a failure to hire or promote; and 4) that the circumstances give rise to an inference of unlawful discrimination. *George v. Ute Water Conservancy Dist.*, 950 P.2d 1195, 1197 (Colo.App. 1997)(applying the *prima facie* elements from the federal age discrimination statute to a CADA age discrimination claim).

There was no dispute at hearing that the first three elements have been met. The evidence showed that Complainant was 51 years old at the time of his application for the Criminal Investigator II position, that he was qualified to be considered for the position of Criminal Investigator II and had been the only person to survive the first testing process for that position, and that he suffered an adverse employment decision when the department declined to hire him for the position.

As for the final element, the evidence in this case also demonstrates that two individuals who were approximately 20 years younger than Complainant were hired for the position. The significant age difference between Complainant and the hired individuals is sufficient to give rise to an inference of unlawful discrimination. *See George*, 950 P.2d at 1197- 98 (reviewing cases in which age differences of two to five years were held to be insufficient, or just marginally sufficient, to meet *prima facie* requirements for age discrimination). As a result, Complainant has presented a *prima facie* showing of age discrimination.

Once Complainant has established a *prima facie* case of discrimination, "the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment decision. If the employer produces such an explanation, the [complainant] must then be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for the employment decision were in fact a pretext for discrimination." *Big O Tires, Inc.*, 940 P.2d at 401. Once such a reason is provided, however, the presumption of discrimination "drops out of the picture"; at that point, the trier of fact must decide the ultimate question of whether the employer intentionally discriminated against complainant. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993). The burden of proving intentional discrimination always remains with the plaintiff. *Lawley v. Dep't of Higher Educ., 36 P.3d 1239,* 1248 (Colo.2001).

Respondent presented persuasive evidence that the second testing process for position #272 did not include any consideration of the applicants' ages and that the decision as to the scoring of the testing results was made in the course of an appropriate testing procedure. Respondent also presented persuasive evidence that the decision to cancel the January 2004 eligibility list was made on the advice of human resources and on

the basis that human resources believed that an incomplete referral list could be cancelled.

Complainant has not persuasively demonstrated that Respondent's contention was pretext and that age played a role in the decision to cancel the January 2004 eligible list and in the handling of his subsequent examination results. At best, Complainant demonstrated that: 1) the department used a constitutionally infirm procedure in cancelling the eligibility list rather than interview him for the position once he was the sole referral; 2) significantly younger applicants were hired out of the second testing process, and 3) the test used for the second testing process placed more of a premium on the oral examination rather than incorporating a written examination along with an oral panel interview.[3]

None of these factors is persuasive that age entered into consideration of Complainant's application. Ms. Manning made the decision to cancel the January 2004 eligibility list without having interviewed Complainant, and she did so based upon a long-standing human resources practice to consider eligibility lists with fewer than three names to be incomplete. While the change in the test may have increased the testing panel's awareness of Complainant's physical appearance and given them more opportunity to see that he was older than the selected candidates, that fact does not persuasively show that age played a role in the scoring of his examination and his non-selection. Finally, the fact that Respondent hired two significantly younger applicants at the conclusion of a testing procedure which Complainant did not pass, without more, is also not persuasive evidence of age discrimination under the circumstances of this case.

Therefore, Complainant has not met his burden to prove that his non-selection for the Criminal Investigator II position was the product of intentional age discrimination.

C. Retaliation Claim:

Under CADA, it is also unlawful for "any person, whether of nor an employer,... to discriminate against any person because such person has opposed any practice made a discriminatory or unfair employment practice by this part 4..." C.R.S. § 24-34-402(1)(e)(IV).

This language is identical to the retaliation provision under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. section 2000e-3(a). Therefore, federal case law interpreting this provision is given persuasive authority by the Board. Board Rule 9-4, 4 CCR 801 ("Standards and guidelines adopted by the Colorado Civil Rights Commission and/or the federal government, as well as Colorado and federal case law, should be referenced in determining if discrimination has occurred").

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[3] Complainant presented evidence about an apparent discrepancy in Mr. Koski's testing process which suggested that he took the test on a different date than the others. The undersigned was not persuaded that this was more than a paperwork error and did not include any findings supporting Complainant's argument on this point.

To establish a *prima facie* case of retaliation under Title VII, a complainant must show: "1) that he engaged in protected opposition to discrimination; 2) that a reasonable employee would have found the challenged action materially adverse; and 3) that a causal connection existed between the protected activity and the materially adverse action." *Jencks v. Modern Woodmen of America*, 479 F.3d 1261, 1265 at note 3 (10th Cir. 2007).[4]

Opposition activity is protected when it is based on a mistaken good faith belief that the anti-discrimination laws have been violated. *Love v. RE/MAX of America, Inc.*, 738 F.2d 383, 385 (10th Cir. 1984). Those who "informally voice complaints to their superiors or who use their employers' internal grievance procedures" are protected under the Act. *Robbins v. Jefferson County School Dist. R-1*, 186 F.3d 1253, 1258 (10th Cir. 1999).

In this matter, Complainant established a *prima facie* showing of retaliation. The first two elements of a *prima facie* case were not disputed at hearing. Complainant filed an internal grievance expressly asserting age and disability discrimination, and he was not hired into a position for which he was the only eligible candidate.

The third element of causation is also present when the temporal proximity of these events is considered. *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584, 596 (10th Cir. 1991) (one and one-half month period between protected activity and adverse action may, by itself, establish causation). Complainant was in the midst of his grievance hearing process when he learned that he had been referred for the Criminal Investigator II position. It was only a matter of weeks between Complainant's grievance hearing and Ms. Manning's decision to cancel the eligible list for the Criminal Investigator II position and start over again.

Accordingly, Complainant presented a *prima facie* showing of retaliation in the cancellation of the January 2004 eligibility list.

Once Complainant has established a *prima facie* case of retaliation, the burden shifts to Respondent "to come forward with a non-discriminatory reason for its employment decision. If the employer presents a non-discriminatory reason for its decision, the burden shifts back to the Plaintiff to show that there is a genuine issue of material fact as to whether the employer's proffered reason for the challenged action is pretextual, i.e., unworthy of belief." *Anderson v. Coors Brewing Co.*, 181 F.3d 1171 (10th Cir. 1999)(internal citations omitted).

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[4] The *Jencks* definition of retaliation applies the test for adverse action developed in the U.S. Supreme Court opinion in *Burlington Northern and Santa Fe Ry. Co. v. White*, -- U.S. --, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006). The prior test referred to the second prong as an "adverse action by the employer subsequent to or contemporaneous with such employee activity." *Berry v. Stevinson Chevrolet*, 74 F.3d 980, 985 (10th Cir. 1996). Under either version of the standard, however, the failure to be hired to a new position when one is the only qualified candidate qualifies as an adverse action.

Respondent's explanation for why the January 2004 eligible list was cancelled was persuasive. Respondent was operating on a firmly-held belief that a department could cancel a list prior to its normal expiration date if that list contained less than three names, and that the department could simply start the recruitment process again. The preponderance of the evidence also established that Ms. Manning did not make her decision to cancel because of any impression or information she had obtained about Complainant. Most importantly for a retaliation claim analysis, the preponderance of the evidence did not demonstrate that Ms. Manning decided to cancel the eligible list because she had learned that Complainant had filed grievances alleging unlawful discrimination. While Respondent's interpretation of the relevant law justifying cancellation of an eligibility list is incorrect, for the reasons that were discussed above, the belief that cancellation of a list was proper provides Respondent with a persuasive non-discriminatory reason for its actions. Complainant has not presented persuasive evidence that this explanation was a pretext for unlawful discrimination.

As a result, Complainant does not prevail on his claim of unlawful retaliation.

D. Remedy:

If the Board determines that there has been personnel action by the state which is arbitrary, capricious or contrary to rule or law, C.R.S. § 24-50-103(6), then the Board is authorized to take appropriate action. "[I]t is apparent that the Board is ultimately responsible for protecting the rights of public employees." *Hughes v. Dept. of Higher Education*, 934 P.2d 891, 893-4 (Colo.App. 1997). *See also Coopersmith v. City and County of Denver*, 399 P.2d 943, 948 (Colo. 1965) ("The purpose of civil service legislation is to protect employees from arbitrary and capricious political action and to insure employment during good behavior").

The Board's authority to remedy a violation is generally expressed as the return of the employee to the state existing prior to the violation. *See Dept. of Health v. Donahue*, 690 P.2d 243, 250 (Colo. 1984)(holding that "[a]ny remedy fashioned in this case should equal, to the extent practicable, to the wrong actually sustained by Donahue" and finding that the proper remedy for the violation of the rules on predisciplinary meetings "restores Donahue to the position she would have been in if the flawed predisciplinary meeting had never occurred..."); *Beardsley v. Colorado State University*, 746 P.2d 1350, 1352 (Colo.App. 1987)(reversing a remedy granted by the Board on the grounds that the remedy chosen "'would place Beardsley in a better position than he would have occupied had he not been terminated improperly"); *Ehrle v. Department of Administration*, 844 P.2d 1267, (Colo.App. 1992)(holding the appropriate remedy for a failure to honor an employee's reinstatement rights "should do no more than place Ehrle in the same situation he would have occupied if the Department had genuinely considered reinstating him after representing that it would do so"). *See also deKoevend v. Board of Education*, 688 P.2d 219, 229 (Colo. 1984)(approving a remedy which "restores the teacher to his status prior to the procedural error"). The Board must also be concerned with not choosing a remedy which produces "an economic windfall vastly disproportionate to the legal wrong"

sustained. *Donahue*, 690 P.2d at 250.5

Complainant's arguments that he was entitled to appointment as a Criminal Investigator II, and that therefore his remedy should compensate him monetarily for the lack of that appointment and should place him into the position, ignores several important points.

First and foremost, while an appointing authority must choose among the top three or such fewer as are referred for appointment if a selection is to be made, there is no authority for the proposition that the appointing authority must fill a position. In other words, while Complainant has the right to compete for the position once he is on a referral list, there is no guarantee that anyone will be chosen for that position because the appointing authority always has the option of not hiring any of the referrals.

Secondly, although the Director's Procedures do not specify the procedure on how to accomplish the supplementation of an eligible list,[6] there is no law or rule preventing an appointing authority from using a testing process to enlarge an incomplete eligible list so that an appointing authority could consider three referrals.

Placing Complainant in the position he would have been in if Respondent had followed the law correctly means that Complainant would have been in a position to compete for a Criminal Investigator II position, with no assurance that he would have been appointed to that position. Thus, the appropriate remedy in this case is to allow Complainant to properly compete for the position of Criminal Investigator II.

E. Attorney fees are not warranted in this action.

Attorney fees are warranted if an action was instituted frivolously, in bad faith, maliciously, or as a means of harassment or was otherwise groundless. C.R.S. § 24-50-125.5 and Board Rule 8-38, 4 CCR 801. The party seeking an award of attorney fees and costs shall bear the burden of proof as to whether the personnel action is frivolous, in bad faith, malicious, harassing, or otherwise groundless. Board Rule 8-38(B)(3), 4 CCR 801.

There was no persuasive evidence at the hearing that Respondent's decision to cancel the January 2004 eligible list for Criminal investigator II was in any way influenced

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[5] The remedies available to the Board in cases in which unlawful discrimination has been shown are often broader than the remedies available generally because of the broad statutory remedies under CADA. *See* C.R.S. § 24-34-405 (defining the relief which may be awarded for unfair or discriminatory employment practices as including the possibility of "back pay, hiring, reinstatement, or upgrading or employees, with or without back pay...").

[6] Director's Procedure 4-20 recognizes that the "addition of names and adjustment of rankings or scores do not affect prior appointment or referrals." This reference to a change in ranking must refer to modification of an eligible list after it had been initially generated, and the addition of names would appear to be a supplementation of the eligible list.

by the fact that it was Complainant who had passed the testing process. Respondent's decision was made on the basis of its desire to have at least three candidates from which to choose. Moreover, Respondent utilized a practice that had been in use for some time and had been taught to agency human resources offices as a legitimate practice by DPA's Division of Human Resources. As a result, there was no evidence which would lead to the conclusion that Respondent cancelled the January 2004 eligible list in order to annoy, harass, or abuse Complainant, or to be stubbornly litigious or disrespectful of the truth.

Given the above findings of fact, an award of attorney fees is not warranted.

CONCLUSIONS OF LAW

1. Respondent's action was arbitrary, capricious, or contrary to rule or law.

2. Attorney fees are not warranted.

ORDER

Respondent's action is **rescinded**. The remedy awarded to Complainant is that Complainant is to be placed on the next Criminal Investigator II referral list and allowed to fully and fairly compete for openings in that class over the six-month (or more) period for which that list is in operation in the same manner as if he had tested within the top three candidates for that eligible list.

Dated this 28th day of July, 2008.

Denise DeForest,
Administrative Law Judge
Colorado State Personnel Board
633 – 17th Street, Suite 1320
Denver, CO 80202
303-866-3300

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. Section 24-4-105(14)(a)(II) and 24-50-125.4(4) C.R.S. and Board Rule 8-67, 4 CCR 801. The appeal must describe, in detail, the basis for the appeal, the specific findings of fact and/or conclusions of law that the party alleges to be improper and the remedy being sought. Board Rule 8-70, 4 CCR 801. Both the designation of record and the notice of appeal must be received by the Board no later than the applicable twenty (20) or thirty (30) calendar day deadline referred to above. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.); Board Rule 8-68, 4 CCR 801.
3. The parties are hereby advised that this constitutes the Board's motion, pursuant to Section 24-4-105(14)(a)(II), C.R.S., to review this Initial Decision regardless of whether the parties file exceptions.

RECORD ON APPEAL

The cost to prepare the record on appeal in this case is $50.00. This amount does not include the cost of a transcript, which must be paid by the party that files the appeal. That party may pay the preparation fee either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS. A party that is financially unable to pay the preparation fee may file a motion for waiver of the fee. That motion must include information showing that the party is indigent or explaining why the party is financially unable to pay the fee.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. Board Rule 8-69, 4 CCR 801. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 59 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 866-3300.

BRIEFS ON APPEAL

When the Certificate of Record of Hearing Proceedings is mailed to the parties, signifying the Board's certification of the record, the parties will be notified of the briefing schedule and the due dates of the opening, answer and reply briefs and other details regarding the filing of the briefs, as set forth in Board Rule 8-72, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Board Rule 8-75, 4 CCR 801. Requests for oral argument are seldom granted.

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ must be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty-calendar day deadline, described above, for filing a notice of appeal of the ALJ's decision. Board Rule 8-65, 4 CCR 801.

CERTIFICATE OF SERVICE

This is to certify that on the 28th day of July, 2008, I placed true copies of the foregoing **INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE and NOTICE OF APPEAL RIGHTS** in the United States mail, postage prepaid, addressed as follows:

Rick Dindinger, Esq.
Truhlar & Truhlar, L.L.P.
7340 E. Caley Ave.
Suite 310
Centennial, CO 80111

and in the interagency mail, to:

Christopher J. Puckett
Assistant Attorney General
Employment Law Section
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Janet F. Sprague
Andrea C. Woods

(rev'd. 5/07)